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No. 80-

IN THE

Supreme Court of the United States

October Term, 1980

FRANK L. HAWKINS,

Petitioner

v.

HOLIDAY INNS, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DAVID BERGER
1622 Locust Street
Philadelphia, PA 19103
(215) 875-4900

Counsel of Record for Petitioner Frank L. Hawkins

Of Counsel

H. LADDIE MONTAGUE, JR.
WARREN D. MULLOY
ALAN C. KESSLER
BERGER & MONTAGUE, P. C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-4900

HAROLD BROWN
BROWN, PRIFTI, LEIGHTON & COHEN
66 Long Wharf
Boston, MA 02110
(617) 227-9265

EDWARD KUHN
McDONALD, KUHN, SMITH, GANDY, MILLER & TAIT
150 E. Court Avenue
Memphis, TN 38103
(901) 526-0606

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTION PRESENTED FOR REVIEW

Whether a restraint by a hotel franchisor which exists in a written agreement and/or combination between the franchisor and franchisee, and which is actively policed by the franchisor, which precluded the franchisee from transferring his three licensed hotels to an otherwise qualified third party constitutes an unreasonable restraint of trade (Sherman Act, § 1, 15 U. S. C. § 1) outside the limited defense of *United States v. Colgate,* 250 U. S. 300 (1919).

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The parties to the proceedings in the courts below are Frank L. Hawkins, Petitioner and Holiday Inns, Inc., Respondent.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT OF CASE	2
ARGUMENT	7
I. The Court Below Has Decided an Important Question of Federal Law Which Should Be Settled by This Court	7
A. The Court Below Has Decided an Important Federal Question in Conflict With the Applicable Decisions of the Supreme Court	9
B. The Court Below Has Decided an Important Federal Question in Conflict With the Applicable Decisions of Other Circuit Courts of Appeals	14
C. The Court Below Failed to Apply the Principles and Doctrine Established by the Supreme Court and Followed by Circuit Courts of Appeals to the Present Case Resulting in Fundamental and Significant Error	19
CONCLUSION	22

TABLE OF CONTENTS (Continued)

APPENDIX: Page

Opinion of the Court of Appeals A1
Opinion of the District Court A6
Judgment of the Court of Appeals A25
Judgment of the District Court A27
Opinion of the Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing En Banc .. A29
Jury Interrogatories A30

TABLE OF AUTHORITIES

Cases:	Page
Adolph Coors Company v. Federal Trade Commission, 497 F. 2d 1178 (10th Cir. 1974)	15
Albrecht v. Herald Company, 390 U. S. 145 (1968)	14, 19, 20
Anderson v. American Automobile Assoc., 454 F. 2d 1240 (9th Cir. 1972)	15
Arnott v. American Oil Company, 609 F. 2d 873 (8th Cir. 1979)	14
Board of Trade of City of Chicago v. United States, 246 U. S. 231 (1918)	21
Byars v. Bluff City News Company, 609 F. 2d 843 (6th Cir. 1979)	7, 8
Campbell v. Olivia M. D., 424 F. 2d 1244 (6th Cir. 1970)	9
Clairol Inc. v. Boston Discount Center of Berkley, Inc., 608 F. 2d 1114 (6th Cir. 1979)	8, 14
Continental Ore Company v. Union Carbide & Carbon Co., 370 U. S. 690 (1962)	4
Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U. S. 36 (1977)	8, 9
Federal Trade Commission v. Beech-Nut Packing Company, 257 U. S. 441 (1922)	11, 13
Fontana Aviation, Inc. v. Beech Aircraft Corp., 432 F. 2d 1080 (7th Cir. 1970) cert. denied, 401 U. S. 932 (1971)	15
Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F. 2d 1296 (9th Cir. 1978)	14, 15
Frey & Son, Inc. v. Cudahy Packing Company, 256 U. S. 208 (1921)	10, 11
George W. Warner & Company, Inc. v. Black and Decker Manufacturing Company, Inc., 277 F. 2d 787 (2d Cir. 1960)	15, 16
Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F. 2d 127 (3d Cir. 1978)	17, 18

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

Lamb Enterprises, Inc. v. Toledo Blade Company, 461 F. 2d 506 (6th Cir. 1972) 21
Lavender v. Kurn, 327 U. S. 645 (1946) 9
Osborn v. Sinclair Refining Company, 324 F. 2d 566 (4th Cir. 1963) 17
Perma Life Mufflers, Inc. v. International Parts Corp., 392 U. S. 134 (1968) 19
Reed Brothers, Inc. v. Monsanto Company, 525 F. 2d 486 (8th Cir. 1975) cert. denied, 423 U. S. 1055 (1976) 15
Simpson v. Union Oil Co. of California, 377 U. S. 13 (1964) 13, 14, 20
Standard Oil of New Jersey v. United States, 221 U. S. 1 (1911) 7
Tenant v. Peoria & P. V. Ry. Co., 321 U. S. 29 (1944) 9
Times-Picayune Publishing Company v. United States, 345 U. S. 594 (1953) 20, 21
Unibrand Tire & Product Company, Inc. v. Armstrong Rubber Company, 429 F. Supp. 470 (W. D. N. Y. 1977) 19
United States v. Arnold, Schwinn & Company, 388 U. S. 365 (1967) reversed on other grounds, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U. S. 36 (1977) 8, 9
United States v. A. Schrader's Son, Inc., 252 U. S. 85 (1920) . 10
United States v. Bausch & Lomb Optical Company, 321 U. S. 707 (1944) 12, 13, 20
United States v. Colgate, 250 U. S. 300 (1919) ....i, 7, 8, 9, 10, 11, 13, 14, 15, 17, 18, 19, 20
United States v. Parke, Davis & Company, 362 U. S. 29 (1960) 8, 11, 12, 13, 14, 16, 17, 20, 21

Statutes:

15 U. S. C. § 1 .....i, 1, 2, 6, 7, 8, 9, 20
15 U. S. C. § 2 8
28 U. S. C. § 1254(1) 1

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is officially reported as follows, and is also printed in the Appendix as indicated.

Opinion of Court of Appeals (Appendix, *infra*, p. A-1) is reported at 634 F. 2d 342 (6th Cir. 1980).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 5, 1980, and is set out in Appendix, *infra*, p. A-25. A timely petition for rehearing, containing a suggestion that the action be reheard *en banc*, was filed on November 21, 1980, and was denied on December 22, 1980. The order of denial is set out in Appendix, *infra*, p. A-29. The jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C. Section 1254(1).

STATUTE INVOLVED

Section One of the Sherman Act (15 U. S. C. § 1) provides in pertinent part:

> "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal . . ."

STATEMENT OF THE CASE

Petitioner, Frank L. Hawkins, commenced suit against respondent, Holiday Inns, Inc., in October, 1974, alleging an unreasonable restraint of trade by respondent in violation of Section 1 of the Sherman Act, 15 U. S. C. § 1,[1] causing injury to petitioner's "business or property," as set forth below. The case was tried before a jury which returned a verdict for petitioner in the amount of $674,-000.00 single damages. The District Court issued an Opinion and Order in effect granting Judgment N. O. V. and the Court of Appeals for the Sixth Circuit affirmed.

Petitioner owned and operated three separate hotels since approximately 1962, and had been granted a Holiday Inns' ("HI") license for each, under Agreements which provided, *inter alia*, that the license "is non-transferable without the written consent of the Licensor". Petitioner expended considerable efforts in building up the name and goodwill of HI within the Mobile area, when, in the normal course of business he decided to sell his inns.

Because petitioner, in originally obtaining financing, had to "cross-collateralize" his three inns he had special problems in attempting to sell them. Accordingly, petitioner had to sell all his inns as a package or not at all, and he had been unsuccessful in several attempts to sell.

As of 1972, Radice Realty and Construction Company, through its Motor Lodge Division, owned, developed and operated five hotel-motels under national franchises (Sheraton, Howard Johnson). Disappointed with its expansion in the hotel-motel industry, Radice Realty sought a dramatic increase in its hotel-motel holdings. In 1971, its Board of Directors ordered that the motor lodge divi-

1. Section 1 of the Sherman Act was the basis for federal jurisdiction in the Court of First Instance (Rules of the Supreme Court of the United States, 21(i)).

sion acquire four motels within eighteen months or else face liquidation. Because of this ultimatum, the president of the motor lodge division, Thomas J. Butler, sought to acquire existing hotels-motels and looked for a city that had multiple operations. As a result of its Board's order, Radice Realty acquired a Ramada Inn in Virginia. Needing three more motels, Radice Realty wished to purchase petitioner's inns, since they fit ideally into the Radice plan and would have given Radice the four inns it needed within the required eighteen months. Accordingly, the needs of both petitioner and Radice complimented each other. Radice presented a unique opportunity for petitioner to sell his three inns.

The Radice Board of Directors and the Finance Committee approved the acquisition, told Mr. Butler to proceed, and authorized the expenditure of $2 million. At this time, Radice had excellent credit, had assets exceeding liabilities, had showed a good profit for the fiscal year, had cash far in excess of the purchase price, and was therefore in a position to consummate the purchase of petitioner's three inns. The jury so found (*see* Answer to Jury Interrogatory No. 1, p. A-30). Accordingly, Mr. Butler apprised petitioner of the authorization to proceed and thereafter, in January, 1973, Radice Realty "made an offer to purchase the three existing Holiday Inns in Mobile, Alabama." The sole material condition precedent to a consummated agreement of sale was that petitioner obtain from HI a confirmation that petitioner could transfer his HI franchises. Radice Realty noted that "upon our receipt of such written confirmation . . . we will direct our attorneys to draft the necessary contracts" and that "we trust . . . will be in the very near future".[2]

2. The Court of Appeals made a naked statement that petitioner never received a bona fide offer from Radice. (Opinion at 4, p. A-4) Notwithstanding that this issue, while it might be

Petitioner then wrote respondent asking for its consent to the transfer of the licenses, advising respondent that the prospective purchasers already operated other hotels-motels. In order to obtain this consent to transfer, respondent had to waive its "non-Holiday Inns" clause, also in the license agreement and which conditioned the grant of a HI franchise on the non-ownership of non-Holiday Inns.[3] Petitioner's sole interest in requesting a

2. (Cont'd.)

relevant in a breach of contract case, has absolutely no relevance in the case *sub judice*—where the issue was whether respondent's enforcement of its non-Holiday Inn provision materially contributed to the aborted sale by petitioner of his inns to Radice (whether or not there was a bona fide offer)—the record overwhelmingly supported, as demonstrated above, a finding that Radice made a bona fide offer to acquire petitioner's inns. Moreover, the Radice episode merely shows that there was some damage or impact and provided a measurable framework for assessing the amount of damage as well. Even assuming *arguendo*, the Radice offer was not a "bona fide offer," petitioner was entitled to have the jury infer and decide from all the evidence whether or not respondent's conduct materially contributed to the loss by petitioner of the sale to Radice, causing him injury. It was the function of the jury, not the District Court, to weigh the evidence and to draw its conclusion. *Continental Ore Company v. Union Carbide & Carbon Company*, 370 U. S. 690, 700-701 (1962). The jury performed that function and concluded that Radice Realty made a bona fide offer to purchase petitioner's inns, Jury Interrogatory No. 1, p. A-30.

3. One indicia of the unreasonableness of the provision is that it *flatly* prohibited ownership in any non-Holiday Inn without regard to the geographic location of those non-Holiday Inns and their competitive effect. For instance, had Radice Realty purchased petitioner's inns in Mobile, Alabama, its other hotel-motels were in Milwaukee, Wisconsin, Virginia, and Ocala and St. Augustine, Florida—substantial distances from Mobile. While many competitors similar to HI had standards resembling those of HI and computerized reservations systems comparable to respondent's reservation system, all had provisions in their license agreements *far less restrictive* than the non-Holiday Inn clause.

transfer of the licenses to Radice and the consequent waiver of the "non-Holiday Inn" clause was so that *he* could effect a *sale* of *his* hotels as Holiday Inns.[4] Respondent denied the requested transfer by summarily refusing to waive that clause,[5] expressly advising petitioner that it had "been our policy for many years" and "the Company is not going to change its policy in this regard unless a court rules otherwise . . .". As a result of respondent's response, dealings with Radice Realty were terminated and therefore never consummated. The jury so found (*see* Answer to Jury Interrogatory No. 4, p. A-31). The jury found that the HI franchise system comprised 15+% of the hotel-motel-motor lodge market. Because of the non-Holiday Inn clause, petitioner could only sell his inns[6] to a maximum of those owning that 15+% of that market, *i.e.*, other owners and operators of HI, and was restrained from selling to the owners/operators of the remaining substantial (85%) portion of the market. In other words, because of the non-Holiday Inn clause and respondent's enforcement of it, only the owners/operators of 15+% of all the hotels-motels-motor lodges throughout the United States[7] qualified to be potential buyers of petitioner's inns and HI franchises. Conversely, because

4. While it is true that petitioner was not seeking to own a competing hotel, (Opinion at 2, p. A-2) *it was petitioner* who sought the transfer and waiver which was required on his part to achieve his sale to Radice.

5. Respondent did not request the identity of or any financial or other information regarding the prospective purchaser. It, therefore, never exercised any purported right to license those it preferred since without any idea as to the identity of the prospective purchaser, the non-Holiday Inn clause was the only reason offered for withholding consent to the transfer of the licenses.

6. Thus, the relevant market was the purchase of hotels, motels and inns and was *not* the actual business of operating hotel-motels.

7. Of that 15+%, respondent was the largest single owner of inns.

of the non-Holiday Inns clause, the owners/operators of 85% of the hotels-motels-motor lodges in the United States were precluded from purchasing petitioner's inns and HI franchises and Radice Realty was part of that 85%. (*See* Answers to Jury Interrogatories Nos. 5, 8(a) and 8(b), p. p. A-31-32).

District Court

The case went to trial before a six person jury, Judge Harry W. Wellford presiding. After several trial days, the case was submitted to the jury. The jury was asked to answer thirteen specific and technical interrogatories, many consisting of subparts and requiring computation. (*See* pp. A-30-33). On September 15, 1977, the jury answered the interrogatories in favor of petitioner on his charge that respondent violated Section 1 of the Sherman Act in the amount of $674,000.00 single damages.[8] Subsequent to the trial, petitioner moved for entry of the judgment based upon the jury's verdict in the amount of $2,220,000 treble the amount of the damages found by the jury. Defendant renewed its motion for a directed verdict and Judge Wellford issued an Opinion and Order, in effect granting Judgment N. O. V. (p. A-6).

Court of Appeals

Petitioner filed an appeal from the District Court's order which subsequently resulted in the Opinion and Order of the Court of Appeals for the Sixth Circuit, affirming that order. (p. A-1). The Court of Appeals subsequently denied petitioner's petition for rehearing with suggestion that the action be reheard *en banc*. (p. A-29).

8. The jury found *inter alia:* the "non-Holiday Inns" clause was "calculated adversely to effect the public interest . . ." (Jury Interrogatory No. 5, p. A-31) and that its effect "under the circumstances [was] an unreasonable restraint of trade" (Jury Interrogatory No. 6, p. A-31).

ARGUMENT

I.

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The opinion of the Court of Appeals for the Sixth Circuit in this matter has created a controversy of great public moment in the enforcement and application of the antitrust laws. In supporting its decision in a case brought under Section 1 of the Sherman Act for a violation to be judged under the Rule of Reason standard,[9] the Court of Appeals for the Sixth Circuit absolutely and blindly relied upon the cases of *United States v. Colgate*, 250 U. S. 300 (1919) and *Byars v. Bluff City News Co.*, 609 F. 2d 843 (6th Cir. 1979). In doing so, the opinion of the Court below created two basic and fundamental infirmities which cannot stand without severely impairing the Supreme Court's pronouncements. First, the Court below construed the case strictly as a "refusal to deal" case.[10] Petitioner has consistently maintained throughout the proceedings that the case does not involve a refusal to deal and that *Colgate* is inapplicable. The Court below then simply cited *Colgate* completely omitting any reference to the litany of cases subsequently decided by the Supreme Court and followed by the Circuit Courts of Appeals, which subsequently qualified the "Colgate Doctrine".

9. First developed by the Supreme Court in *Standard Oil of New Jersey v. United States*, 221 U. S. 1 (1911).

10. There is a clear and fundamental distinction between refusal to deal cases where a defendant has refused to deal with a plaintiff, and the case at bar where respondent's conduct precluded a petitioner from dealing with a third party. *See* n. 4, *supra*, at 5.

Second, the Court below also relied upon *Byars, supra* (a distributor termination case). The Court of Appeals admitted that *Byars* concerned *single firm monopoly power* under *Section 2* of the Sherman Act and the circumstances under which a *monopolist* has a duty to deal. Applying this inappropriate line of reasoning, the Court claimed that petitioner *never* alleged in his Complaint or in any other pleading that the case involved monopolization by respondent under § 2 of the Sherman Act. From its inception, the case *sub judice* concerned a restraint of trade under § 1 of the Sherman Act. By applying the law and rationale of *Byars, supra,* a monopolist's unilateral refusal to deal case, and by ignoring the Rule of Reason test followed in that Circuit,[11] the Court of Appeals for the Sixth Circuit clearly erred as a matter of law, and has created an inconsistency and conflict with the decisions of the Supreme Court and Courts of Appeals.[12]

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11. It is indeed curious that the Court of Appeals would have relied upon *Byars, supra,* (a *monopolist* refusal to deal case) rather than *Clairol, Inc. v. Boston Discount Center of Berkley, Inc.,* 608 F. 2d 1114 (6th Cir. 1979), a refusal to deal case under § 1 of the Sherman Act, applying the Rule of Reason. In *Clairol,* unlike the case *sub judice,* even the Court of Appeals for the Sixth Circuit noted that *Colgate* "has substantially been narrowed by subsequent decisions of the Supreme Court . . ." The Court also explained that there was evidence that the manufacturer, as in *United States v. Parke, Davis & Company,* 362 U. S. 29 (1960), undertook policing actions designed to restrict the resale of its product. Furthermore, the Court held that a letter sent by the manufacturer to its distributors arguably established that the relationship and restriction was a matter of *agreement,* so that the manufacturer's action went "beyond the simple refusal to sell and warning which might be protected by the *Colgate* Doctrine." 608 F. 2d at 1123.

12. Even *U. S. v. Arnold, Schwinn & Co.,* 388 U. S. 365, 381-2 (1967) *reversed on other grounds, Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U. S. 36 (1977), recognized that in determining

The decision of the Court below is one of great potential significance. Before its influence spreads to other jurisdictions, the decision below should be reviewed by the Supreme Court.[13]

A. The Court Below Has Decided an Important Federal Question in Conflict With the Applicable Decisions of the Supreme Court

The decision below departs radically from and fundamentally misconstrues the legal doctrine governing "refusals to deal" established by the Supreme Court in a long and unbroken line of decisions.

In *United States v. Colgate,* 250 U. S. 300 (1919), the Supreme Court held that a seller "may announce in advance"—but not contract—"the circumstances under which he will refuse to sell" 250 U. S. at 307. However, as the Supreme Court explicitly mandated, while a seller

12. (Cont'd.)
the lawfulness of a franchise contract under § 1 of the Sherman Act, the Rule of Reason test applied. Indeed, *Sylvania, supra,* reaffirmed this view.

13. It must also be emphasized that the factual issues in this case were presented to the jury in the form of 13 detailed interrogatories (with sub-parts, Appendix, p. A-30) and after careful consideration, the jury found for petitioner. There was substantial evidence to support each of the jury's findings. However, the Court below let stand the District Court's rejection of inferences drawn by the jury from the evidence and substitution of its own findings as a trier of fact after having resolved evidentiary conflicts in favor of respondent, and having weighed and considered the credibility of witnesses. This was a highly improper way to review a record in considering a direct verdict or judgment n.o.v., a clear usurpation by the court of the functions of the jury and presented an unquestionable denial of the petitioner's constitutional right to a trial by jury. *Tenant v. Peoria & P. V. Ry. Co.,* 321 U. S. 29 (1944); *Lavender v. Kurn,* 327 U. S. 645 (1946); *Campbell v. Olivia M. D.,* 424 F. 2d 1244, 1245 (6th Cir. 1970).

is free to select its customers, it may not do so in a way that achieves forbidden ends.

Almost immediately following its decision in *Colgate*, the Supreme Court began qualifying it. In *United States v. A. Schrader's Son, Inc.*, 252 U. S. 85 (1920) the Supreme Court explained that *Colgate* went no further than to protect a manufacturer who

> merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them ° ° °

but that manufacturer entered into an unlawful combination when he:

> enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers ° ° °
>
> 252 U. S. at 99-100.

The next case decided by the Supreme Court was *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U. S. 208 (1921). In reversing the Court of Appeals for the Fourth Circuit which had found no formal agreement to maintain resale prices, the Supreme Court referred to its decision in *Schrader, supra*, that the:

> essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances.

so that:

> Having regard to the course of dealing and all the pertinent facts disclosed by the present record, we think whether there existed an unlawful combination or agreement between the manufacturer and jobbers was a question for the jury to decide, and that the

> Circuit Court of Appeals erred when it held otherwise.
>
> 256 U. S. at 210.

In *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441 (1922), the third case decided within three years after *Colgate,* the Supreme Court found that Beech-Nut had indulged in a number of restrictive practices including refusals to sell to those who would not adhere to the policy and a system of reporting to detect violators. The Court rejected Beech-Nut's contention that its conduct was legal under *Colgate* by stating that the

> Beech-Nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate* case was held to be within the legal right of the producer.
>
> 257 U. S. at 454.

In discussing the limited effect of the *Beech-Nut* decision on *Colgate,* the Supreme Court later said in *United States v. Parke, Davis & Company,* 362 U. S. 29, 41-42 (1960):

> * * * because *Beech-Nut's* methods were as effective as agreements in producing the result that "all who would deal in the company's products are constrained to sell at the suggested prices," 257 U. S. at page 455, 42 S. Ct. at page 155, the Court held that the securing of the customers' adherence by such methods constituted the creation of an unlawful combination to suppress price competition among the retailers.
>
> That *Beech-Nut* narrowly limited *Colgate* and announced principles which subject to Sherman Act liability the producer who secures his customers' ad-

> herence to his resale prices by methods which go beyond the simple refusal to sell to customers who will not resell at stated prices, was made clear in *United States v. Bausch & Lomb Optical Co.*, [Citations omitted].

Next in this progeny was *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944), where a distributor sold only to "licensed" wholesalers who were willing to cooperate with its policy, and the "licensed" wholesalers "were allowed to *resell only* to retailers who held *licenses*" from the distributor (a requirement strikingly similar to the effect of the non-Holiday Inn clause in the case at bar).[14] 321 U. S. at 714. Moreover, the retailer's agreement to conform to the *license requirement* was enforced by surveillance and by cancellation of the retailer's license if he failed to abide by its terms. The Supreme Court, in condemning this plan, declared:

> So far as the wholesalers are concerned, Soft-Lite and its officers conspired and combined among themselves and with at least some of the wholesalers to restrain commerce . . . *by limiting the customers of the wholesalers to those recommended by the wholesalers and approved by Soft-Lite*—all in violation of the Sherman Act.
>
> • • •
>
> Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial. (Emphasis supplied).
>
> 321 U. S. at 723.

14. If a wholesaler did business with unapproved retailers it was excluded from the distributors' list of designated wholesalers.

In assessing the impact of *Bausch & Lomb* and *Beech-Nut* upon the continuing limited application of *Colgate*, the Supreme Court commented in *Parke, Davis,*[15] *supra.*

> Thus, whatever uncertainty previously existed as to the scope of the Colgate doctrine, Bausch & Lomb and Beech-Nut plainly fashioned its dimensions as meaning no more than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act. In other words, an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; *such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.*
>
> * * *
>
> *When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices,* . . . he has put together a combination in violation of the Sherman Act.
>
> Thus, whether an unlawful combination or conspiracy is proved *is to be judged by what the parties actually did rather than by the words they used.* [Citations omitted.] 362 U. S. at 43-44. (Emphasis supplied). (*See also, Id.* at 45).

In later cases, the Supreme Court has followed its increasingly restrictive view of *Colgate*. Thus, in *Simpson*

15. Parke, Davis refused to sell to wholesalers who did not adhere to its policy and refused to sell to wholesalers who sold Parke, Davis products to retailers who did not observe the suggested minimum retail prices.

v. Union Oil Company of California, 377 U. S. 13 (1964) the Court reiterated that the fact that a retailer can refuse to deal does not give the supplier immunity "if the arrangement is one of those schemes condemned by the antitrust laws." 377 U. S. at 16.

Finally, in explaining how a "combination"—which, like agreements, are outside of *Colgate*—might arise, the Supreme Court in *Albrecht v. Herald Company*, 390 U. S. 145, 150 n.6 (1968), noted that the petitioner, under *Parke Davis, supra*, could have claimed a combination between the distributor-manufacturer and himself, "at least as of the day he [petitioner] unwillingly complied with the distributor-manufacturer's condition." [16]

B. The Court Below Has Decided an Important Federal Question in Conflict With the Applicable Decisions of Other Circuit Courts of Appeals

The Circuit Courts of Appeals have carefully noted the erosion of the "Colgate doctrine" and have applied a type of strict scrutiny standard in those cases in which it has been raised.[17]

For instance, in *Fount-Wip, Inc. v. Reddi-Whip, Inc.*, 568 F. 2d 1296, 1300 (9th Cir. 1978), the Ninth Circuit reversed the district court's grant of a judgment notwithstanding the verdict on a refusal to deal claim holding that a refusal to deal "which is anti-competitive in purpose or

16. The Supreme Court added that the petitioner could have also claimed a combination between the distributor-manufacturer and its distributors (carriers), and did in fact claim a combination between the distributor-manufacturer and petitioner's customers. *See also, Arnott v. American Oil Company*, 609 F. 2d 873 (8th Cir. 1979) (combination exists between franchisor and franchisee when franchisee complied with the restraint, even unwillingly).

17. *See Clairol, Inc. v. Boston Discount Center of Berkley, Inc.*, 608 F. 2d 1114 (6th Cir. 1979), *supra* at p. 8, n. 11.

effect, or both, constitutes an unreasonable restraint of trade in violation of the Sherman Act." (Emphasis supplied). *See also, Anderson v. American Automobile Association*, 454 F. 2d 1240 (9th Cir. 1972). Similarly, in *Fontana Aviation, Inc. v. Beech Aircraft Corporation*, 432 F. 2d 1080, 1085 (7th Cir. 1970), *cert. denied*, 401 U. S. 932 (1971), the Seventh Circuit reversed the trial court's grant of a judgment n.o.v.,[18] after admonishing that the right of a manufacturer to deal with whom it pleases "is neither absolute nor exempt from regulation. If it is accompanied by unlawful conduct or agreement . . . the right is deemed to have transgressed the act." *See also, Reed Brothers, Inc. v. Monsanto Company*, 525 F. 2d 486, 495 (8th Cir. 1975), *cert. denied*, 423 U. S. 1055 (1976); *Adolph Coors Company v. Federal Trade Commission*, 497 F. 2d 1178 (10th Cir. 1974).

In *George W. Warner & Co., Inc. v. Black & Decker Manufacturing Company, Inc.*, 277 F. 2d 787 (2d Cir. 1960) the Second Circuit presented a cogent and thoughtful analysis of the Supreme Court decisions qualifying *Colgate*:

> For some forty years, the Colgate doctrine had "become part of the economic regime of the country upon which the commercial community and the lawyers who advise it have justifiably relied." (Dissenting opinion, Mr. Justice Harlan in *United States v. Parke, Davis and Co., supra*, [362 U. S. 29, 80 S. Ct. 518]). That they did so advise and did so rely is not open to doubt; whether they did so "justifiably" in the light of warning signals during this period is more debatable.
>
> * * *

18. "[D]eference must be given to decisions of the trier of fact." *Id.*

> Almost immediately after the Colgate decision the Supreme Court in two price fixing cases (*United States v. A. Schrader's Sons, Inc.*, 252 U. S. 85, 86, 40 S. Ct. 251, 64 L. Ed. 471; *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441, 451, 42 S. Ct. 150, 66 L. Ed. 307) began to qualify the Colgate decision.
>
> In this circuit in *Adams-Mitchell Co. v. Cambridge Distributing Co.*, 2 Cir. 1951, 189 F. 2d 913, 916 . . . Judge Frank in a vigorous dissent . . . [a]fter tracing the history of the Supreme Court's opinions on the subject, he said, "Considering the course of Supreme Court anti-trust decisions on the subject of price-fixing since Colgate was decided, it seems to me that, although that doctrine may not be wholly dead, yet, by distinctions stopping just short of extinction, it has been reduced to almost imperceptible proportions."
>
> * * *
>
> *The Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise . . .*
>
> The court indicated [in *Parke, Davis, supra*] that when the manufacturer's actions "go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices" then he has put together a combination in violation of the Sherman Act. [Emphasis supplied]
>
> 277 F. 2d at 789-790.

The Fourth Circuit Court of Appeals discussed the effect of *Parke, Davis* and other Supreme Court cases on

Colgate in *Osborn v. Sinclair Refining Company*, 324 F. 2d 566 (4th Cir. 1963). In reversing the district court's decision based upon *Colgate*, the Court held that the decision "was flatly opposed to many cases limiting" a refusal to deal. 324 F. 2d at 571. The Court restated the *Parke, Davis* teachings that when a seller goes beyond a mere announcement of its policies

> "and he employs other means which effect adherence" to his policy . . . if the seller pressures his customers or dealers into adhering to . . . exclusive dealing . . . he has put together an unlawful arrangement and taken himself outside the narrow protection afforded by Colgate.
>
> 324 F. 2d at 573.

Finally the Court observed:

> The right of customer selection sanctioned by Colgate must not, as Parke, Davis shows, be taken in its literal generality. The appellee bases too much on Colgate, without taking into account qualifying pronouncements in later decisions, which are not less canonical.
>
> * * *
>
> It is clear from the Schrader's Englander, and Warner cases, as well as many others, that *if the seller imposes a trade restraining arrangement upon his customers, whether they be willing or reluctant, the seller has acted outside the protection of Colgate.* . . . If the arrangement or combination between the seller and his dealers is put together through the coercive tactics of the seller alone, this is sufficient. [Emphasis supplied]
>
> 324 F. 2d 573-574 nn. 12 and 13.

Similarly, in *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F. 2d 127 (3d Cir. 1978), after review-

ing an exclusivity clause in a shopping center lease, the Third Circuit Court of Appeals directed that the right to refuse to deal is neither absolute nor exempt from regulation:

> [p]articularly where the refusal to deal is not unilateral but rather is prompted by an understanding with other parties, an antitrust violation may be found, either by application of a *per se* rule or through a "rule of reason" analysis.
>
> 587 F. 2d at 142.

The Third Circuit Court of Appeals added that the existence of the lease agreement, containing the exclusivity clause, together with the managing agent's (of the shopping center) refusal to extend the lease, could prove the existence of a "contract, combination or conspiracy in restraint of trade."

Thus, a steady and unbroken line of Supreme Court decisions commencing immediately after the *Colgate* decision, as well as the decisions of those Circuit Courts of Appeals which have followed the letter and spirit of the Supreme Court, have severely qualified and narrowed *Colgate* as follows: (1) *Colgate* went no further than to protect a manufacturer who "merely indicated" the conditions under which it does business and refuses to deal, (2) *Colgate* does not protect the manufacturer whose condition is contained in an agreement—either express or implied from a course of dealing or other circumstances (which is a question for the jury), (3) *Colgate* does not protect the manufacturer who is part of a combination which is created by a manufacturer who secures adherence to its condition by methods, not necessarily contractual, which go beyond a mere announcement of those conditions coupled with a simple refusal to deal—*e.g.*, taking affirmative action to detect those who were violating the condi-

tions, (4) that combination or agreement may exist between the plaintiff and the manufacturer as of the day the plaintiff unwillingly complied with the manufacturer's condition.

C. The Court Below Failed to Apply Principles and Doctrine Established by the Supreme Court and Followed by Circuit Courts of Appeals to the Present Case Resulting in Fundamental and Significant Error

The Court below in the case *sub judice* failed to cite, mention or otherwise refer to a single one of the Supreme Court decisions criticizing and qualifying *Colgate.*[19] As such, the the Court of Appeals' mere blind reliance upon *Colgate* ignores, conflicts with and is flatly opposed to the more than sixty years of case law decided since *Colgate.* In fact, had the Court below addressed the decisions of the Supreme Court and other Circuit Courts, it would have concluded that the respondent's conduct—its enforcement or application of the "non-Holiday Inn" clause—did not fall within the very "narrow channel" of the *Colgate* defense.

First, the restraint—the refusal to agree to the transfer because of "non-Holiday Inn" provision—was contained in a written *agreement* (the franchise agreement) with respondent, petitioner and all other Holiday Inn franchisees. *Albrecht, supra; Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134, 139-140 (1968).[20]

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19. To the extent that Colgate has been "eroded almost to extinction." *Unibrand Tire & Product Co., Inc. v. Armstrong Rubber Co.*, 429 F. Supp. 470, 474 (W. D. N. Y. 1977).

20. This is the same contract which petitioner contended, and the jury found, was a contract in unreasonable restraint of trade.

It is undisputed that Section 1 of the Sherman Act is aimed at a concert of action, and not at purely unilateral conduct (*Colgate*). However, the case *sub judice* does not concern unilateral conduct—the mere announcement in *Colgate*—but specifically involves a concert of action evidenced by an agreement. Thus, without going any further, the written contract between respondent and petitioner renders *Colgate prima facie,* inapplicable.

Second, as in *Bausch & Lomb, supra, Parke, Davis, supra,* and *Albrecht, supra,* even assuming *arguendo* no agreement, a concert of action is nevertheless present in the combination existing between respondent, petitioner and other Holiday Inn franchisees relating to the enforcement of a non-Holiday Inn policy. There was evidence before the jury that respondent relied upon the participation and feedback of its franchisees in successfully enforcing the policy. Such combination takes respondent's conduct outside the *Colgate* defense.

Third, as in *Parke, Davis, supra,* and other cases, respondent also went beyond the mere announcement of its condition by enforcing it against petitioner and actively *policing* the provision to detect violators. Respondent relied upon employees of its Inspection Department who visited the franchised inns to actively detect violations, and upon the reports of other franchisees.

Finally, if either the "object or *effect*" was to unreasonably restrain trade, an "otherwise reasonable trade arrangement must fall," *Times-Picayune Publishing Company v. United States,* 345 U. S. 594, 614, 622 (1953), and "the fact that a retailer can refuse to deal does not give [it] immunity if the arrangement is one of those schemes condemned by the antitrust laws." *Simpson v. Union Oil Company of California,* 377 U. S. 13, 16 (1964). As already explained, the effect of respondent's enforcement of the non-Holiday Inn clause in the instant case—what it

"actually did" *Parke, Davis, supra,*[21]—was to: preclude petitioner's sale of his inns; "lock up" the owners of approximately 15% of the market (represented by respondent owned and managed inns and other Holiday Inn franchised inns), and foreclose purchases of Holiday Inn hotels by the other 85% of the market representing owners of other hotels, motels and inns, in a manner found by the jury to constitute an unreasonable restraint of trade, Jury Interrogatories 6, 8(a) and (b), p. A-31, 32.[22]

21. While the terms of a contract may be inoffensive on their face, the "Act [Sherman] deals with competitive realities, not words." *Times-Picayune Publishing Company v. United States, supra,* 345 U. S. at 614-615.

22. Whether a restraint is unreasonable under Section 1 of the Sherman Act is a question of fact to be determined by the jury. *Board of Trade of Chicago v. United States,* 246 U. S. 231 (1918); *Times-Picayune Publishing Co., supra; Lamb Enterprises, Inc. v. Toledo Blade Company,* 461 F. 2d 506, 517 (6th Cir. 1972).

CONCLUSION

The decision below presents an issue of extreme public importance which should be decided by the Supreme Court, since it conflicts with the decisions of the Supreme Court and the other Courts of Appeals. The Petition for Certiorari should be granted.

Respectfully submitted,

DAVID BERGER
1622 Locust Street
Philadelphia, PA 19103
(215) 875-4900

Counsel of Record for Petitioner
Frank L. Hawkins

Of Counsel:

H. LADDIE MONTAGUE, JR.
WARREN D. MULLOY
ALAN C. KESSLER
BERGER & MONTAGUE, P. C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-4900

HAROLD BROWN
BROWN, PRIFTI, LEIGHTON & COHEN
66 Long Wharf
Boston, MA 02110
(617) 227-9265

EDWARD KUHN
MCDONALD, KUHN, SMITH, GANDY,
MILLER & TAIT
150 E. Court Avenue
Memphis, TN 38103
(901) 526-0606

Appendix.

No. 78-1244
No. 78-1245

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK L. HAWKINS,
Plaintiff-Appellant,
Cross-Appellee

v

HOLIDAY INNS, INC.,
Defendant-Appellee,
Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE.

Decided and Filed November 5, 1980.

Before: KEITH, KENNEDY, AND MARTIN, *Circuit Judges.*

MARTIN, Circuit Judge. This case was commenced in October 1974 by Frank L. Hawkins against Holiday Inns, Inc. for alleged violations of Section 1 of the Sherman Act (15 U. S. C. § 1) and Section 3 of the Clayton Act (15 U. S. C. § 14). Prior to trial, Hawkins dismissed his claims under Section 3 of the Clayton Act.

Hawkins has been a franchisee of Holiday Inns in the Mobile, Alabama area since 1961, and for an even longer period of time elsewhere. As of 1973, Hawkins owned three motels in the Mobile area, all three then being operated as Holiday Inns motels pursuant to franchises granted by Holiday Inns.

In the franchise agreements between Holiday Inns and Hawkins, Hawkins agreed not to own, operate, be connected with or associated with any hotel or motel other than Holiday Inns hotels or motels. This is the so-called "non-Holiday Inn clause."

The non-Holiday Inn clause reflected Holiday Inns' unilaterally adopted policy of not granting franchises to competitors. It is undisputed that Holiday Inns never prevented Hawkins from owning, operating, being connected with or associated with any other hotel or motel. In fact, on two occasions Hawkins owned motels other than Holiday Inns motels, without objection from Holiday Inns.

In 1972 and 1973, Hawkins, through a real estate broker, Hardin B. Arledge, solicited negotiations with Radice Realty and Construction Corp. looking toward the sale of his Mobile motels and the franchises granted to him by Holiday Inns. Although Hawkins owned the motels, the franchise agreements between Holiday Inns and Hawkins could not be unilaterally assigned by Hawkins to a third party. At the time of the negotiations with Hawkins, Radice Realty owned motels other than Holiday Inns motels.

While Hawkins knew of Holiday Inns' policy of not granting a franchise to a competitor, he wrote to Holiday Inns and generally inquired if Holiday Inns would waive its non-Holiday Inn policy for a potential purchaser of his motels and franchises. Hawkins did not disclose Radice Realty's identity or submit any information relating to it, other than to state that the potential purchaser owned competing motels. Hawkins did not seek a waiver of the non-Holiday Inn policy on his own behalf because he was not seeking to own or operate a competing motel.

Holiday Inns responded by restating its policy of not issuing franchises to competitors and its intention to main-

tain this policy to the extent permitted by law. Hawkins did not communicate further on this subject with Holiday Inns; Radice Realty never communicated with Holiday Inns.

Hawkins sued. Simply put, the gravamen of Hawkins' complaint was that Holiday Inns unreasonably restrained trade by enforcing the clause in his franchise agreements which prevented Hawkins from buying an interest in a competing motel by preventing him from selling his trademark and service mark agreements with Holiday Inns (i.e., his franchises) to a competitor. Hawkins admits he was free to sell his motels without the Holiday Inns license agreements.

Hawkins has never asserted any claim for or on behalf of Radice Realty, nor has Radice Realty asserted any claim on its own behalf. Rather, Hawkins asserted that Holiday Inns' conduct constituted an unreasonable restraint which injured him in his trade or business and sought damages of $2 million before trebling.

The case was tried in Memphis. At the close of Hawkins' case, Holiday Inns moved for a directed verdict, pursuant to Rule 50(b), Federal Rules of Civil Procedure. The trial court took the motion under advisement.

At the close of all the evidence, both parties moved for a directed verdict. Hawkins' motion was summarily denied; the trial judge continued to reserve decision on Holiday Inns' motion. The jury returned responses to jury interrogatories finding in favor of Hawkins in the amount of $674,000 single damages, subject to trebling.

The trial court never entered judgment based upon the responses to jury interrogatories. On January 25, 1978, an opinion granting Holiday Inns' motion for a directed verdict was entered which stipulated that if the directed verdict were set aside by this Court, the verdict would be set at a maximum of $280,000 damages, before trebling.

On February 7, 1978, the Clerk of Court filed a judgment in accordance with the memorandum opinion.

Hawkins appealed the judgment entered on the directed verdict in favor of Holiday Inns. Holiday Inns cross-appealed from the portion of the judgment which allows, in the event judgment in its favor is set aside, the verdict to be set at $280,000, subject to trebling.

The trial court applied the correct standard in directing a verdict in favor of Holiday Inns as a matter of law, and the evidence was such that there could be but one reasonable conclusion as to the correct verdict. Hawkins never received a bona fide offer to purchase his Holiday Inns motels from Radice Realty.

Holiday Inns never enforced the non-Holiday Inn clause in its franchise agreements with Hawkins against Hawkins. There was no evidence from which it could reasonably be concluded that Holiday Inns refused to deal with anyone. Holiday Inns' contracts with Hawkins were not in restraint of trade. The rule of law sought to be imposed by Hawkins lacks any commercial value.

Considering all the evidence most favorably to Hawkins, at most he has proven that Holiday Inns unilaterally refused to deal with an unidentified entity, Radice Realty, conduct which was and is lawful under *United States v. Colgate & Company,* 250 U. S. 300 (1919).

As a matter of law, there was no evidence from which anyone could reasonably conclude that: (a) Holiday Inns caused Hawkins any injury in fact; (b) the interest Hawkins sought to protect was in the zone of interests protected under Section 1 of the Sherman Act; or (c) any injury to Hawkins was a direct result of Holiday Inns' conduct. Hawkins has suffered no legally cognizable injury, for he still owns and operates the three inns as Holiday Inns motels and is receiving all of the benefits of his contractual relationship with Holiday Inns.

In *Byars v. Bluff City News Co.*, 609 F. 2d 843 (6th Cir. 1979), this Court outlined the law on refusals to deal for the benefit of the lower court to which it was remanding the case. At the outset, the Court stated that, as a general rule, "there exists no duty to deal, so long as the determination is made unilaterally." 609 F. 2d at 854. The Court then noted:

> Franchisees and distributors which have been unilaterally terminated have discovered to their chagrin that ordinarily the law offers them no remedy absent proof that a conspiracy against them took place. (Citations omitted)
>
> . . .
>
> Even the use of unfair business practices as part of the termination may not invoke sanction under the antitrust laws. (Citations omitted)

609 F. 2d at 854-855.

This Court concluded by stating that if the defendant in *Byars* were found not to possess monopoly power, it could have terminated, with impunity, its relationship with plaintiff.

It is clear from the record that Holiday Inns has acted unilaterally in the instant case. Further, there was not even an allegation that Holiday Inns possessed monopoly power in the hotel-motel business. Holiday Inns did not refuse to deal with Radice Realty. Even if it had refused, however, the refusal was unilateral and, as recognized in *Byars,* would not invoke sanction under Section 1 of the Sherman Act.

The judgment of the District Court in favor of the defendant Holiday Inns, Inc. is affirmed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. C-74-521

FRANK L. HAWKINS,

Plaintiff,

v.

HOLIDAY INNS, INC., et al.,

Defendants.

MEMORANDUM OPINION

Plaintiff filed an action against Holiday Inns, Inc., hereafter (HI), Kemmons Wilson, its Chief Executive Officer, and Charles M. Collins, another HI executive and its general counsel, asserting Sherman Act (15 USC § 1) and Clayton Act (15 USC § 14) anti-trust violations and demanding a jury trial on the issues. The case, from the outside to conclusion, before this Court, has been ably, vigorously, and hotly contested in view, perhaps, of two other prior substantial lawsuits between Hawkins and HI.[1]

1. The first litigation by Hawkins charged anti-trust violations in the form of illegal tie-ins and other breaches of responsibility under law by HI. It involves class action claims and is pending in other divisions of this Court. The second by *Hawkins v. HI* involved a claim for breach of contract respecting an additional HI franchise in Mobile, Alabama, and resulted in a verdict and judgment for plaintiff, settled by payment to Hawkins of $350,000.

Plaintiff here challenged a contractual provision in his HI franchise agreement pertaining to operation of three existing Holiday Inn motels in or about the City of Mobile, Alabama; his contention is that the clause in question constitutes an illegal restraint in preventing his sale of the motels and the HI franchise rights during 1973 to prospective purchasers who had interests in other motel franchise operations at the time, and generally in limiting his ability to sell his interests in the motels in question.

Prior to trial, after the Court had heard and overruled a motion for summary judgment submitted by defendants, plaintiff dismissed the Clayton Act claim and all claims against Wilson and Collins personally. See the Court's Order on the summary judgment motion dated August 26, 1976, for further recitation of facts pertaining to this controversy. Among the principal concerns of the Court with respect to trial was the apparent complexity of the issues involving interpretation of franchise contracts and difficulty of determining damages, if any; accordingly, it was concluded that issues developed during the lengthy trial would be submitted to the jury, if a verdict were not directed, as a matter of law, at the conclusion of the proof.

Plaintiff claims very substantial damages on account of defendant's "non-Holiday Inn clause" [2] which was allegedly utilized unilaterally by HI to prevent competition and eliminate certain purchasers having other motel chain affiliations from obtaining the HI franchise or franchises in the Mobile area. This clause, before it was amended in 1958, provided a geographic limitation "within the license territory," and was accompanied by a so-called "best ef-

2. The so-called "non-Holiday Inns clause" provides in pertinent part: ". . . that licensee will not, directly or indirectly, own any interest in, operate, or be in any manner connected with, any inn, hotel, or motel during the period of this license except Holiday Inns."

forts" clause.[3] See *American Motor Inns v. Holiday Inns*, 365 F. Supp. 1073 (D. N. J. 1973).

Plaintiff took the position in trial that the "best efforts" clause was sufficient to protect HI and its franchisees; that the "non-Holiday Inn" clause unnecessarily and arbitrarily restrained plaintiff from being associated with other inns, hotels or motels and that would-be franchisees were thereby foreclosed illegally from entering the HI sector of the market to the advantage of HI and disadvantage of the plaintiff. Plaintiff took the position that HI was the largest and the dominant factor in the motel market in the United States and particularly as to those with a minimum of 50 rooms, swimming pools, lounges and restaurants, and that its contractual limitation reduced the marketability of plaintiff's HI franchise and interest to his detriment.

Defendant takes the position throughout that it has merely exercised an appropriate unilateral commercial right to choose or reject those with whom they would do business as a HI franchisee, and that the anti-trust laws do not apply to this situation. Plaintiff acknowledges such a right generally, but maintains it is subject to a rule of reason, and that it may not be exercised except in a limited fashion so as not to produce an unreasonable restraint of trade as proscribed by the Sherman Act. Plaintiff contended that he had obtained a desirable offer in early 1973 from the so-called Radice group which owned interests in northern and eastern cities in motel chains that were competitive nationally with HI, and that HI should have waived the "non-Holiday Inns clause" to permit

3. Plaintiff made no contention about the pre-1958 Clause with territorial limitation. The "best efforts clause" reads: "Licensee does further covenant and agree . . . to use every reasonable means to encourage use of 'Holiday Inns' on a national basis by the traveling public."

plaintiff to consummate his expressed desire to sell his interests in three Inns he had acquired in Mobile to this particular prospective purchaser.

The case went to trial before a jury after seven full trial days and issues were presented in interrogatory form to the trier of fact after discussion as to the form and content. At the conclusion of plaintiff's proof, defendant moved for a directed verdict on several bases which will again be considered fully. At the time the Court felt that the issues presented were close questions, but that, giving plaintiff the benefit of doubt, the matters involved should be presented for a jury determination. The plaintiff relied almost entirely on himself and one Philip Lowe, a former executive with Sheraton Division of I. T. T., to develop damages in connection with his claim, supported by some statistical evidence. Primarily, however, plaintiff claimed that relocation or completion of a new expressway or a causeway across a part of Mobile Bay effectually by-passed his most lucrative and successful location, Holiday Inn East (hereafter East), during 1977, bringing about a dramatic drop in value of that location, and this was the largest element in the damage claim and perhaps the most disputed. Lowe's testimony, which was neither impressive nor persuasive to the Court, was to the effect that defendant's actions had caused plaintiff damage of some $2,000,000, taking into account the "income" and "future prospects" approach, which he testified was the only valid approach under the circumstances.[4]

We shall consider first the issues raised on the motion for directed verdict at the conclusion of plaintiff's proof.

4. Lowe's testimony was amended in his rebuttal wherein he admitted a change in analysis based upon factors not previously known to him so that damage would be reduced, from his viewpoint, to approximately one-half from his previous estimate on direct examination.

Considered reasonably and most favorably from the plaintiff's standpoint, it had been established (in addition to the facts previously noted):

1. The HI franchise agreement had been changed in 1958, with Hawkins' full knowledge and consent, as well as that of all other HI franchisees throughout the country, to incorporate the "non-Holiday Inn" policy without geographic limitation. The consequence was to establish a HI national policy that a franchisee, or prospective franchisee, could not own an interest in a competing motel chain, unless HI issued a waiver of that policy.[5] Origi-

5. In September of 1973, the validity of this policy of operation, among others, by HI and the International Association of HI (hereafter IAHI), was for the first time considered by a federal court, *American Motor Inns v. Holiday Inns, Inc.*, 365 F. Supp. 1073 (D. N. J. 1973). Hawkins and his counsel are reflected as having participated in the appeal of that decision. See 521 F. 2d 1230, 1234 (3rd Cir. 1975). This particular clause was considered in 365 F. Supp. 1073, 1081-1084 of the trial Judge's opinion, and he concluded:

> "Although HI claims that the purpose of the non-Holiday Inn clause was and is to preserve the integrity and utility of the national reservation-referral system, I find that in operation that clause had had a much broader effect. That effect is the intended one of reducing and preventing competition among Holiday Inns franchisees and between franchised inns and company-owned inns. I find that if HI sought solely to protect its reservation-referral system, such protection was and is available through other provisions of its contract (*e.g.* best efforts clause), and was and is available through less restrictive provisions of the type utilized by other national hostelers."

The Court of Appeals, however, in 1975, remanded that decision because of relevant market aspects of the case, 521 F. 2d 1230, 1248:

> "Because the district court opinion does not demonstrate that in making his rule of reason analysis the trial judge took into account many of the relevant conditions in the industry,

nally, the purpose of this clause, or its predecessor, was to insure adequate HI representation in a given territory, but later its purpose evolved into that of preserving and protecting its national reservation-referral system, for which each franchisee is charged a periodic fee; to protect HI's other special methods of operation, and to insure the loyalty of franchisees.

2. Hawkins started in Evansville, Indiana, in 1958 as a HI franchisee and subsequently acquired three such Inns in Mobile.[6]

3. Hawkins became interested about 1970 in selling his Mobile HI interests and contacted brokers about that time, including Arledge in Florida and Krieger in Indiana, the latter a national specialist in sale of Holiday Inns, both on a commission arrangement. Hawkins was unsuccessful in getting his desired price from HI or others for these Inns (about $1,200,000 exceeding his net worth or equity) based on an assumption of his involved and complex mortgage indebtedness of approximately $3,000,000. During 1972, Hawkins opposed issuance of another franchise in the Mobile area by HI and about that time also con-

5. (Cont'd.)

that portion of the judgment regarding the reasonableness of the non-Holiday Inn clause must be vacated. Since the parties may have adduced at trial relevant information which is not manifested in the district court's opinion, the case will be remanded for a re-evaluation of this question by the district court on the basis of the existing record."

There was a settlement effectuated before any further decision after remand.

6. At one time after 1958, despite the "non-Holiday Inn Clause", Hawkins operated an independent (Thunderbird) and a Quality Inn Motel in Mobile, but he was permitted to convert these into Holiday Inns after meeting requirements imposed upon all HI franchisees.

tested the failure of HI to carry through on a proposed franchise to him in the Dauphine Island area near Mobile. (This was the second suit referred to in footnote 1).

4. In late 1972, plaintiff entered into negotiations with Radice Realty & Construction Co. (hereafter Radice Realty) for sale of the three Inns, East, and the others designated as "West" and "Downtown". At the time, Radice Realty controlled six motels, including a Howard Johnson, a Sheraton and a Ramada Inn franchise, none in or near Mobile. Negotiations with Radice Realty in Florida were intermittently conducted through broker Arledge and on January 26, 1973, Radice Realty's Butler of its Motor Lodge Division, wrote "to confirm our desire to enter into a contract to purchase. . . . Mobile Downtown, East and West, together with all of the land, improvements, furnishings, equipment and fixtures . . . as well as approximately 5.6 acres . . . with respect to which a Holiday Inn franchise has been granted to you." The letter acknowledged a 36 room addition to Downtown "now under construction . . . to be ready for business no later than April 30, 1973," and a purchase price of $4,600,000, "including existing or to be existing mortgages . . . prior to closing."

Butler's letter stated a readiness to "commence the drawing of a contract of purchase" to incorporate "the above as well as all of the various terms and conditions which will be necessary to consummate the transaction," with "one of the prime conditions precedent . . . the approval by Holiday Inns of our company or a subsidiary . . . to act as the operating franchisee." It was further set out that neither would be bound until contracts were "finalized."

5. Two months later, March 26, 1973, Hawkins wrote a letter to HI which set out "that there have been serious

discussions regarding the sale of my franchises to a group of individuals in Florida. The purchasers have asked whether they could obtain the approval of the transfer . . . since they already own and operate other hotels, including a Sheraton . . . and two Howard Johnson motels." Hawkins acknowledged the contractual prohibition but felt it was "unfair and . . . may be illegal as well."[7] He asked HI for a waiver of this provision.

6. Promptly after receipt, HI's Collins in April replied that "it has been our policy for many years, and is still our policy, not to grant a franchise to anyone operating a competitive hotel or motel." He acknowledged a present challenge by litigation to that provision of the contract, but expressed confidence in its validity and an intention not to change the policy "unless a court rules otherwise and all appeals have been exhausted." (See footnote 5 for an explanation of the eventual course of that litigation in which plaintiff participated on appeal). HI made the response without knowledge of the identity of Radice Realty as the potential Mobile franchisee. Plaintiff himself never notified HI of this identity, and neither the broker nor Butler could establish actually sending HI a franchise application by Radice Realty or following up on the matter during the nearly two month delay after a tender proposal before they were made aware by Hawkins of the April, 1973, HI negative response.[8] Such a franchise application was apparently prepared in February of 1973 but not delivered to HI. The standard practice in

7. Plaintiff had doubtless consulted his own counsel about this in light of the *American Motor Inns* case in New Jersey referred to, and a pending dispute of another Florida franchisee about this question with HI during 1972.

8. Butler testified he was willing, indeed anxious, to discuss Radice Realty's interest in the purchase and felt remiss in not contacting HI directly.

Florida was that the seller pay a six per cent commission to the agent on consummation of such a transaction.

7. Radice Realty began experiencing serious financial problems during 1973 in its motel business aggravated by the national energy crisis at that time. Butler's testimony as head of that Division indicated no construction loans concluded during 1973 or 1974 involving his Division, which, in the latter year, was liquidated due to the then financial plight of Radice Realty. The latter customarily financed motel acquisitions by means of selling the "equity" to investors. In this instance only one potential investor out of some ten to fifteen usual ones was contacted relative to this proposed purchase at the time Radice Realty expressed its "desire to enter into a contract to purchase," and the investors would have been ultimately expected, according to Butler, to have put up more than $1,500,000 in cash to complete the transaction, had it proceeded to a closing.[9]

8. For the fiscal year ended June 30, 1972, Radice Realty's President (who was contemplated to be the franchisee if the deal were concluded) reported to its stockholders that "from an income standpoint, it was a disappointing year . . . we experienced losses [due to] nationwide depressed economy." Further, the "motor lodge business showed a loss for the year as a result of a depressed economy . . ." The June 30, 1972, consolidated statement of equity in Radice Realty reflected an accumulated deficit of nearly $1,000,000, and more than that amount of reduction in cash from the beginning of fiscal 1971 to June 30, 1972. In its June 30, 1973, annual report to S. E. C., Radice Realty reported the operation of

9. Butler's deposition testimony so indicated; his later trial testimony was that he may have mentioned the Hawkins deal to several.

only five motels, and that it was "responsible for construction financing" of motels, which "together with the cash payments made by limited partnership" investors "is sufficient to pay for construction and development costs of the motel." It was further reported that Radice Realty officers acted "as general partners for the limited partnerships" and were "indemnified for any losses they may sustain as general partners." The year ended June 30, 1973, although presenting a better earnings picture, reflected a further substantial reduction in cash and continued accumulated deficit. Notes to the motel operating statement reflected a low rate of occupancy in the Sheraton Motel (its second largest), necessitating a reduction to one-half of the fee on gross room sales. The next year, beginning July 1, 1973, showed large losses and necessary disposition of the motel division during that fiscal year.

9. There was, according to Radice Realty's Butler, a misunderstanding about the Dauphin Island franchise situation at the time in January, 1973, he wrote to Hawkins. If no franchise were available, as it later developed, he expressed confidence that the matter could have been negotiated but the offering price would have been reduced at least $280,000.[10] Butler considered Hawkins' mortgages outstanding at the time to be approximately $2,700,000, not including an increase due to expansion; Radice Realty was very interested and concerned about debt service requirements, monthly and annually, particularly in light of the in-process addition to the Downtown Motel. Radice Realty was interested in the Hawkins' Mobile interests only if the HI franchises were included.

10. Butler testified that Hawkins did not tell him the fourth franchise had been rejected by HI; that the $4,600,000 offer included the fourth franchise and the land on which the fourth Holiday Inn (Dauphin Island) was to be built.

Plaintiff concedes he was free to sell the properties and assets absent the franchises if he wished, but felt this would represent loss of 30% to 40% of overall value. Butler felt Radice Realty had or could obtain the capital for this Mobile proposed expansion in early 1973 despite its cash and operating difficulties. Hawkins testified that Radice Realty (through Butler) would use its own money (approximately $1.5 million) for the purchase then might syndicate or sell to other partners.

10. This suit was instituted October 3, 1974, while or immediately after Hawkins had contacted HI about potential purchase of his Inns. Three of the questions dealt with the offer by Radice Realty and were answered by the jury as indicated:

> "1. Was there a bona fide offer by Radice Realty to Hawkins for all of his Mobile motels and property which offer Radice Realty was capable of carrying out and qualified to conclude?
>
> YES X
> NO _____
>
> 2. If your answer to No. 1 is yes, when, in the normal course, would Radice Realty and Hawkins have been able to complete the transaction (after approval of the franchise application and all other requirements)?
>
> DATE July 1973
>
> 3. (a) If your answer to No. 1 is yes, was the sales agreement subject to a commission?
>
> YES X
> NO _____
> If so, how much?
> AMOUNT $276,000

3. (b) Did the Radice Realty offer include any value for Hawkins' 5.6 acres of land?

YES X
NO _____
If so, how much?
AMOUNT $280,000 "

11. Hawkins was aware of the required HI procedure in respect of franchises. The necessary fee was to accompany the completed form—in this case at least $10,000 and the applicant was to submit required financial information and motel experience, together with other requirements. HI did not receive the application fee from Radice Realty nor any information dealing with the worth of Radice Realty nor its principal officer who was to be proposed as franchisee, Arthur Radice.

The Court was of the opinion there was a close issue in light of the proof at the end of plaintiff's proof as to whether or not there was, in fact, a bona fide offer from Radice to Hawkins upon which the latter could base his claim of subsequent loss. There was definite interest on the part of Radice Realty, and a specific proposal was submitted through a Florida real estate agent, Arledge, for *four* Holiday Inn franchises and properties on which they were to be located. It was recognized that at least $1.5 million would be required from Radice Realty to conclude the transaction, even without the fourth Inn's construction being accounted for—at least, $1.8 million (to about $2 million) if the cost of the fourth (Dauphin Island) Inn were to be included, per Arledge's calculations and proposals to Radice Realty.

Upon a review of the evidence, the Court is of the opinion that there was not sufficient evidence, as a matter of law, to treat the Radice Realty offer as a firm contract proposal. At best, it was an invitation for a return offer

since Hawkins did not own the franchises which he represented to Radice that he owned. Indeed, a part of the offer the jury found, was for land on which there was no available franchise with a value attributed by the jury to be $280,0000. There were many contingencies involved even in March of 1973 when Hawkins wrote HI not intending to divulge the name of the potential buyer. There was no fourth HI franchise available to Hawkins; what adjustment would have been acceptable to the parties is conjectural at best. Neither Hawkins nor the interested buyer submitted the franchise application fee and information in order to determine whether Radice Realty were otherwise acceptable to HI without regard to the "non-Holiday Inn clause". The jury's determination that the matter would have been concluded in July, 1973, is the earliest that it could reasonably had been believed the parties would or could have adjusted their contract price; determined mortgage balances after finishing the Downtown renovations and improvements then in progress; worked out a legal contract; submitted necessary information to HI; prepared closing papers; adjusted commission claims of Arledge which Hawkins was not prepared to accept; and worked out a myriad of other details for a closing.

Particularly if the Court takes into account the defendant's proof on this question, it seems entirely speculation to reach a conclusion that Radice Realty's offer for four Holiday Inns was ever accepted by Hawkins in the light of the incontrovertible facts at the time, or that Hawkins' ability to sell only three such Inns was finally acceptable to Radice Realty; and if so, on what terms. That there was no contract, even conditionally subject to HI approval, seems inescapable. Furthermore, in view of all the proof and evidence, it seems also highly conjectural, as a matter of law, to be able to conclude that in

July of 1973, Radice Realty could have carried out any agreement (concluded subsequent to March of 1973) to be responsible for a substantial outlay of cash as specified at closing.[11] While Radice Realty had been able to interest equity investors previously, reasonable investors, as well as HI, would necessarily have investigated the rapidly deteriorating condition of Radice Realty which was then in the process of beginning to liquidate or dispose of its motel operations. There was no actual meeting of the minds, irrespective of the "non-Holiday Inn clause" policy, regarding the ability of Radice Realty, after July 1, 1973, to carry out such a substantial acquisition; nor did Hawkins and Radice Realty ever come to a firm agreement about number of inns, amount of mortgage to be assumed, and final purchase price, nor commission arrangements. It was further demonstrated by defendant's proof that HI would, in all likelihood, not have approved Radice Realty as a franchisee, absent the clause in controversy as an acceptable financial risk. Reasonable minds would have reached the result indicated; that there was no binding offer pending when the matter was submitted to HI. Plaintiff, given the benefit of favorable inferences, failed to prove a causal connection between the enforcement of the allegedly illegal clause and plaintiff's asserted damages. There was no firm value to be established without complete speculation in the Radice Realty negotiations for four Holiday Inns. Even if plaintiff is found to have failed, as a matter of law, to have proved a contract upon which to base his action, there are other serious stumbling blocks to the recovery sought by plaintiff in light of the

11. The asserted fact that the Radice Realty Board in 1971 had authorized Butler to move ahead with motel acquisitions is no basis to conclude in the face of seriously declining financial circumstances in 1973 that it was economically in a position to approve or accept a final contract calling for large cash outlays.

jury's response to interrogatories. Plaintiff argues that the jury has found that the enforcement of the "non-Holiday Inn clause" was an unreasonable restraint of trade and that plaintiff was injured by it and that he should be found entitled to $2,022,000, applying a treble damages standard. Plaintiff is correct in his assertions if there were a legitimate and legal basis for the jury's findings.

If the "non-Holiday Inn clause worked a restraint of trade, and if the question then is whether or not the restraint is unreasonable, plaintiff has persuaded the jury that there was an unreasonable restraint insofar as Hawkins was concerned, although the Court's judgment, if it were the trier of fact, would have been that the evidence preponderated against such a result. Did it also appear from the evidence that the policy tended to prejudice or was reasonably calculated to prejudice the *public interest*? See *Lamb Enterprises v. Toledo Blade Co.*, 461 F. 2d 506, 515 (6th Cir. 1972); *Malamud v. Sinclair Oil Corp.*, 521 F. 2d 1142, 1151 (6th Cir. 1975). The record here shows that Holiday Inns represented only 17% of the market; that there was vigorous and active competition among various large operators in motel franchising; that there were hundreds and even thousands of potential investors interested in HI franchises, both those who were already involved in the HI operations in some way, and others who were not. The jury found that about 15% of the market was foreclosed to Hawkins for competitive buying of his Mobile interests under the policy in dispute. The law recognizes a right in the franchisor of a service mark to participate in negotiations of a franchise sale and that a franchisor may restrict the franchisee's sale. *Kestenbaum v. Falstaff Brewing Corp.*, 514 F. 2d 690 (5th Cir. 1975).[12]

12. This case was cited and relied upon in memoranda by both parties; indeed, plaintiff's counsel described it as "similar factually" to this case.

As stated in that case, the franchisor "has a strong interest in the vitality of a new franchisee;" thus it may restrain franchise sales "for good business reasons" so long as it does not unreasonably injure competitors. It is also stated in *Kestenbaum, supra,* that "the test of anti-trust legality of such a restraint is whether the effect upon competition in the marketplace is substantially adverse. *United States v. Arnold Schwinn & Co.*", 388 U. S. 365 (1967).

If the restraint be considered with respect to Radice Realty, plaintiff has failed to make out a case; Radice has not shown that it has been damaged and plaintiff has no right or standing to claim damage on Radice Realty's behalf. The plaintiff has no complaint based upon any alleged restraint upon him not to engage in operating or owning non-Holiday Inn motels or hotels; there has been no proof whatever showing any damage in this respect. The only restraint that can be claimed by plaintiff under the jury's finding is that 15% of the market was foreclosed to him with respect to a desired sale. This does not, as a matter of law, constitute a substantially adverse effect upon the public, or tend to indicate elimination or destruction of competition, where plaintiff has not shown that he had a firm contract with a segment of that fifteen per cent (15%) of the market.

The fact that HI competitors did not require in their franchises non-ownership in competitive Inns or hotels is not, in the Court's opinion, proof that the clause in controversy is illegal, invalid, or unreasonable, particularly in light of the success of defendant in maintaining its successful Holidex referral system, an end fervently desired by plaintiff and other HI franchisees.

In the light of all the evidence as to a broad and widespread availability of potential purchasers, and the plaintiff's failure to prove that he was damaged by reason of a failure to conclude a firm contract for his three Holiday

Inns for a firm price with Radice Realty, reasonable minds could not conclude that the defendant's practice with regard to the "non-Holiday Inn clause" resulted in public injury or destructive competitive practices. Even plaintiff's counsel concedes HI has valid and strong interests in its service mark; it may refuse to license or franchise its use unless "conceived to achieve forbidden ends" or "accompanied by unlawful conduct or agreement" or "conceived in monopolistic purpose or market control." *Times-Picayune Publishing Co. v. United States,* 345 U. S. 594 (1953); see *United States v. Colgate Co.,* 250 U. S. 300 (1919); *Continental TV v. GTE Sylvania,* — U. S. —, 5 Trade Reg., Reg. ¶ 61,488 (1977).

"Even where a manufacturer or supplier has a policy aimed at a result, which, if accomplished through an agreement or combination would amount to an unreasonable per se restraint of trade, he nevertheless may, in the absence of such agreement or combination, refuse to deal with a purchaser in accordance with the announced policy . . ." *Amplex of Maryland v. Outboard Marine Corp.,* 380 F. 2d 112, 116 (4th Cir. 1967), *cert. den.,* 389 U. S. 1036 (1968); see *Osborn v. Sinclair Refining,* 286 F. 2d 832 (4th Cir. 1960), *cert. den.,* 366 U. S. 963 (1961). Plaintiff did not show that the clause in question operated to deprive him of his property or business as an operator of Holiday Inns.

For the indicated reasons, even if plaintiff is given favorable inferences in support of proof adduced in the face of a motion for directed verdict or by judgment notwithstanding a verdict, this Court is disposed to grant the motion made by defendant. If, however, in the event of an appeal, the responses of the jury indicating an unreasonable restraint were found to be supported by sufficient evidence, and if there were sufficient proof of causal connection and resulting damages to plaintiff and/or injury

to the public under the Sherman Act, Section One, requirements, this Court would still conclude that the damages indicated are excessive, unsupported by proof and unjustified.

There is no credible proof justifying plaintiff's prospective receipt of any amount above a net of $750,000 from Radice Realty, taking into account commission owed, closing expenses, and the recovery Hawkins has already effected from defendant in another suit, and the effect of taxes on any gain realized by plaintiff.

Neither could any reasonable conclusion be reached but that plaintiff did not lose by the continued operation of his Holiday Inns after the abortive effort to sell to Radice Realty. His profits continued during and after 1973, and his cash flow continued to be satisfactory into 1977. At a maximum, assuming that Radice Realty had been able after mid-1973 to carry out the purported negotiation for purchase, plaintiff could not have lost by reason of continued operation more than $10,000 a year for three years, a total of $30,000 (*not* $230,000) in contrast to investment of the net amount received during that period. The jury found a maximum $500,000 present net value to Hawkins of his interest in the Mobile Inns. The more logical and reasonable proof was, if the Court were to exercise a factual judgment, nearer $750,000 as a minimum. Giving a maximum and fair appraisal and estimation of damage, and eliminating speculation as much as possible, plaintiff should be awarded demonstrated damages of a maximum of $280,000, if any at all.

The jury was unduly influenced by the sketchy and short-term figures pertaining to Mobile East after the change of location of the principal highways, a change which should have been anticipated by any reasonable prospective purchaser for several years before 1976. While the Court has concluded that a judgment for plaintiff

should not be entered, it should at the same time compliment plaintiff's counsel on the good presentation made on Hawkins' behalf in these extended proceedings.

Let a Judgment be entered noting plaintiff's exceptions accordingly. Each party will bear his or its own costs under the circumstances.

This 25th day of January, 1978.

/s/ HARRY W. WELLFORD
Harry W. Wellford, Judge
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 78-1244
78-1245

FRANK L. HAWKINS,
Plaintiff-Appellant,
Cross-Appellee,

v.

HOLIDAY INNS, INC.,
Defendant-Appellee,
Cross-Appellant.

Before: KEITH, KENNEDY, and MARTIN, Circuit Judge.

JUDGMENT

(Filed Nov. 5, 1980)

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western, District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee, Cross-Appellant recover from Plaintiff-Appellant, Cross-Appellee the costs on appeal, as itemized below, and that

execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

A True Copy.

Attest:

/s/ (Illegible)
Deputy Clerk

Issued as Mandate: DECEMBER 30, 1980
COSTS: NONE
Filing fee ..... $
Printing $
Total $

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TENNESSEE,
WESTERN DIVISION

Civil Action File No. 74-521

FRANK L. HAWKINS,

Plaintiff,

v.

HOLIDAY INNS, INC.,
A Tennessee Corporation,

Defendant.

JUDGMENT

This action came on for trial before the Court, Honorable HARRY W. WELLFORD, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, it is Ordered and Adjudged that in accordance with the Memorandum Opinion dated January 25, 1978, entered by the Court, Judgment is entered on behalf of the defendant notwithstanding the jury verdict in this cause. Furthermore, in the event this Judgment for the defendant be set aside, the Court reduces the amount of the verdict to a maximum of $280,000, subject to the treble damage provision of the Act. The verdict is unfounded on the proof and evidence submitted, involves speculation and is against the weight and effect of the evidence to the extent it exceeds

the amount indicated, and further is indicative of passion and caprice against defendant under all the circumstances.

APPROVED:

/s/ HARRY W. WELLFORD
Harry W. Wellford, *Judge*
United States District Court

Dated at Memphis, Tennessee, this 7th day of February, 1978.

J. FRANKLIN REID
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 78-1244
78-1245

FRANK L. HAWKINS,
Plaintiff-Appellant,
Cross-Appellee

v.

HOLIDAY INNS, INC.,
Defendant-Appellee,
Cross-Appellant.

ORDER

(Filed Dec. 23, 1980)

Before: KEITH, KENNEDY, and MARTIN, *Circuit Judges.*

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this Court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the Court's opinion;

Now, therefore, the motion for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN
Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. C-74-521

FRANK L. HAWKINS,

Plaintiff,

v.

HOLIDAY INNS, INC.,

Defendant.

JURY INTERROGATORIES

1. Was there a bona fide offer by Radice Realty to Hawkins for all of his Mobile motels and property which offer Radice Realty was capable of carrying out and qualified to conclude?

YES √
NO _____

2. If your answer to No. 1 is yes, when, in the normal course, would Radice Realty and Hawkins have been able to complete the transaction (after approval of the franchise application and all other requirements)?

DATE July 1973

3. (a) If your answer to No. 1 is yes, was the sales agreement subject to a commission?

YES √
NO _____
If so, how much?
AMOUNT $276,000

3. (b) Did the Radice Realty offer include any value for Hawkins' 5.6 acres of land?

YES √
NO _____
If so, how much?
AMOUNT $280,000

4. If your answer to No. 1 is yes, was the offer frustrated by the Holiday Inns use of the so-called "non-Holiday Inn clause"?

YES √
NO _____

5. If you find Holiday Inns enforced the "non-Holiday Inn clause", was the action of Holiday Inns in enforcing this clause as to Hawkins reasonably calculated adversely to affect the public interest (prospective purchasers of and/or investors in motels, hotels and motor lodges), or did it tend adversely to affect the public interest?

YES √
NO _____

6. If your answer to No. 4 is yes, was the effect of the "non-Holiday Inn clause", under the circumstances, an unreasonable restraint of trade?

YES √
NO _____

7. If your answer to No. 6 is yes, did the restraint have a not insubstantial effect on interstate commerce?

YES √
NO _____

8. (a) Plaintiff contends that the relevant market within which trade or commerce has been unreasonably restrained is the purchase by those owning interests in and/or operate hotels, motels and motor lodges.

Defendant contends that the relevant market to which you should direct your attention is the investment in hotels, motels and motor lodges by any eligible investor.

Do you agree with the contention of:

PLAINTIFF √

DEFENDANT _____

8. (b) Whichever relevant market you determine to be appropriate, what percentage of that market, if any, do you find has been foreclosed to competition?

15+%

9. If your answer to No. 1 and No. 4 is yes, what was the net amount to be realized by Hawkins from this sale to Radice Realty of the three Holiday Inns in Mobile?

AMOUNT $944,000

10. Has Hawkins made good-faith efforts to sell his Mobile Inns to a purchaser acceptable to Holiday Inns since April 4, 1973?

YES √

NO _____

11. What is the present net value to Hawkins of his three Mobile Holiday Inns (the fair market value of his interest aside from his mortgage commitments)?

AMOUNT $500,000

12. Did Hawkins lose or gain by the operation of his Holiday Inns during the interim period between the proposed Radice Realty sale and the present time in contrast to his investing conservatively the proposed net proceeds from Radice Realty during that same period?

LOSE √

GAIN _____

HOW MUCH? $230,000

13. If your answer to No. 4 and No. 6 is yes, what was the damage, if any, actually and directly suffered by

Hawkins from Holiday Inns' refusal to consider the Radice Realty proposal, taking into account:

(a) Loss, if any, in value of the three Holiday Inns (the difference between Interrogatory No. 9 and Interrogatory No. 11)?

AMOUNT $444,000

(b) Any other proximate loss or damage, if any, (refer to Interrogatory No. 12)?

AMOUNT $674,000

/s/ WILLIAM DWAYNE KELLEY
FOREMAN

DATE: Sept. 15, 1977